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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHON WHITE,

Defendant and Appellant.

B212137

(Los Angeles County
Super. Ct. No. BA331047)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Patricia Titus, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan
Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Stephon White of one count of selling cocaine base, following which White admitted that he had suffered two prior strike convictions and had served three prior prison terms. The trial court sentenced White to the four-year middle term for the offense, doubled to eight years for a prior strike conviction. We affirm the judgment.

FACTS

On July 25, 2007, a Los Angeles Police Department narcotics team consisting of two units of two officers in plain clothes set up surveillance near an alley on Broadway, near 60th and 61st Streets. At about 5:45 p.m., Officer Annette Razo — sitting in one of the unmarked police vehicles, observing with binoculars — saw a woman, later identified as Lanita Hamilton, walk up to White. After the two talked for a minute or so, Hamilton handed some cash to White, and White bent on his knee and removed an item from his left shoe area. White held the item in his left hand and appeared to manipulate the item with his right hand. White removed a smaller item from the item held in his left hand and gave the smaller item to Hamilton. White then put the original item back into his shoe, and Hamilton lifted up her dress and put the smaller item in the back of her underwear area. White and Hamilton then started walking down the alley together.

Officer Razo and her partner followed after White and Hamilton, and Officer Razo radioed the second narcotics unit for assistance. As Officer Razo and her partner walked up to Hamilton, Detective Erik Armstrong and his partner walked up to White.

Upon reaching White, Detective Armstrong asked White if he had any drugs on him. White admitted that he did, and took off his left shoe. White had a small baggie containing 15 small pieces of rock cocaine in his shoe.

In December 2007, the People filed an information charging White with one count of selling cocaine base. The information further alleged that White had served three prior prison terms and that he had suffered a prior strike conviction in 1992 for rape and a prior strike conviction in 1987 for robbery.

At a trial by jury in July 2008, the People presented evidence establishing the facts summarized above. On July 24, 2008, at 12:02 p.m., the jury returned a verdict finding White guilty of the single count charging him with selling cocaine base. The trial court

then admonished the jurors and ordered them to return after the lunch recess. Before the jurors returned, White waived his right to a jury trial on the prior conviction allegations, and admitted that he had served three prior prison terms, and that he had two prior strike convictions. On September 18, 2008, the trial court sentenced White to a four-year middle term, doubled to eight years pursuant to the “Three Strikes” law. The trial court dismissed the three prior prison term enhancements.

DISCUSSION

I. The Search of White’s Shoe Was Lawful

White contends his conviction must be reversed because the trial court erred when it denied his motion to suppress the drugs found in his shoe. We disagree.

The recovery of the drugs in White’s shoe did not result from an unlawful search. Although *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*) ordinarily would not permit a police officer to search inside a person’s shoe because searches within the *Terry* context are limited by an officer’s ability to articulate a concern for his or her safety, that limitation does not pose a problem in White’s current case. Detective Armstrong lawfully searched White’s shoe because Detective Armstrong had probable cause to arrest White prior to the search.

A police officer may temporarily stop and investigate a person on a public street when the circumstances would indicate to a reasonable observer in a like position that the person may be involved in criminal activity. (*Terry, supra*, 392 U.S. at pp. 16-22; *People v. Souza* (1994) 9 Cal.4th 224, 230.) Under *Terry* jurisprudence, there can be no doubt that Detective Armstrong acted within constitution bounds when he temporarily stopped and investigated White. Officer Razo observed White take an item from his shoe, then take a smaller item out of the original item taken from his shoe and hand the smaller item to Hamilton in exchange for money. White then put the original item taken from his shoe back into his shoe, while Hamilton put the smaller item she had received from White into her underwear. This activity would suggest to any reasonable observer that some manner of suspicious sales transaction had taken place, and the officers were not constitutionally prohibited from investigating whether the activity had, in fact, been a

criminal drug sale. (*People v. Souza, supra*, 9 Cal.4th at p. 242 [one of the constitutionally permissible functions of a *Terry* stop and investigation is to resolve ambiguity over whether criminal activity is afoot].) None of the authorities cited by White support the proposition that Detective Armstrong was not permitted to assist the investigation because he himself did not see the original suspicious activity.

White's reliance on *People v. Jones* (1991) 228 Cal.App.3d 519 for a different conclusion is misplaced. In *Jones*, the Court of Appeal found that a police officer had not been authorized to conduct a *Terry* stop and investigation because the officer had seen nothing more than a transfer of money between the defendant and another person. We agree with the proposition that a simple transfer of money between two persons, standing alone, is not suspicious activity, and will not support a *Terry* stop and investigation. In White's current case, however, the police officers saw much more than a mere transfer of money. As noted above, White took an item from his shoe, and then took a smaller item out of the item taken from his shoe and handed the smaller item to Hamilton in exchange for money. White then put the item taken from his shoe back into his shoe, and Hamilton put the smaller item she had received into her underwear. Given the nature of the activity they saw, the officers were within constitutional bounds and acting on more than a mere hunch when they investigated whether a drug sale had, in fact, occurred.¹

The question then becomes whether the search of White's shoe, after he had been properly stopped for investigative purposes, passed constitutional muster under the Fourth Amendment.² We find that the search was proper because Detective Armstrong had probable cause to arrest White before the search occurred.

¹ Having determined that the trial court correctly found there existed "reasonable suspicion" to investigate, we need not address White's challenge to the trial court's alternate finding that the encounter between White and Detective Armstrong was a permissible "consensual" encounter.

² White's arguments in his opening brief primarily focus on whether Detective Armstrong acted within permissible constitutional bounds when he stopped White to investigate his behavior. We have taken the next step in the analysis in order to set the ensuing search in context.

At the hearing on White's motion to suppress, the circumstances of the search of his shoe were described by Officer Razo (the sole witness) as follows: "I heard Detective Armstrong ask Mr. White if he had any narcotics on him. At that point, he said he had it in his shoe, and then I saw Detective Armstrong go down to the left side of [Mr. White's] shoe and remove a plastic bindle. Detective Armstrong showed me this bindle. It had individually wrapped small bindles of rock cocaine. [¶] . . . [¶] [Next, w]e transported both . . . Hamilton and White to the station."

Probable cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037; see also *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742 [probable cause is determined by evaluating the totality of the circumstances].) In White's current case, Detective Armstrong was a member of a narcotics surveillance team when he received a radio call to assist in a stop and investigation of a possible drug sale. Detective Armstrong then spoke to White, and asked if he had any narcotics on him. In response to the detective's query, White said he had drugs in his shoe. We find that, at the moment White admitted that he possessed drugs, Detective Armstrong had probable cause to arrest White. The ensuing search was not constitutionally improper.³

II. The Trial Court Did Not Abuse its Discretion in Denying the Motion to Dismiss Prior Strikes

White contends his sentence must be vacated because the trial court abused its discretion when it denied his *Romero*⁴ motion to dismiss his prior strikes.⁵ We disagree.

³ We agree with White that there are differences between the evidence at the suppression hearing and at trial. We do not, however, reweigh the credibility of witnesses on appeal, and, in any event, the evidence is consistent that White admitted possessing drugs before any search occurred.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

⁵ At one passage in his *Romero* motion, White specifically requested that the trial court dismiss his strike conviction in 1992 for rape. The remainder of his motion,

In considering whether to dismiss a defendant's prior strike, a sentencing court is guided by this standard: may the defendant, in light of the nature of his present crime, his history of prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, "be deemed outside the spirit" of the Three Strikes law, in whole or in part, and, hence, treated as though he had not suffered the prior strike conviction. (See *People v. Williams* (1998) 17 Cal.4th 148, 163.) A sentencing court's decision not to dismiss a defendant's prior strike is reviewed on appeal under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

The trial court denied White's *Romero* motion for the following stated reasons:

"I'm going to deny the motion to strike the prior and [am] declining to exercise my discretion in that regard. I've considered the defendant's background, the nature of the present offense, and other individualized considerations. [A]lthough I acknowledge the nature of the present offense in that the testimony at trial was that your 13 [sic] bindles could also be used for personal use over the course of a day and a half, the jury heard the evidence and decided that there was [a] sale in this case. [¶] And given the defendant's entire criminal background, I acknowledge since his conviction for the rape charges, everything's been drug related. So I have to take into consideration the entire criminal history. [¶] So I think it's appropriate to sentence this case as a second strike in the doubling of the sentences instead of just handling it as if there were no strikes since that's what happened on his drug case in 2003 and he was on parole when [his current] offense occurred. [¶] So for all of those reasons, motion to strike the prior three-strike prior is denied."

The record shows the trial court understood that it had the discretion to dismiss White's strike, that court undertook a studied evaluation of factors relevant to making such a decision, and shows that, after making that evaluation, the court concluded the interests of justice would best be served by imposing a doubled sentence under the Three

however, suggests that he desired to be sentenced as a nonstrike defendant, which would have meant that both his prior strike in 1992 for rape, and his prior strike in 1987 for robbery would have needed to be dismissed. Prior to the start of trial, however, the prosecutor had agreed that the People "would be proceeding on a presumptive second strike on [White's] case," and, apparently in accord with that understanding, the trial court sentenced White as though he had one prior strike, notwithstanding that he admitted that he had two prior strikes. That is how we construe the record.

Strikes law. We simply cannot say that the trial court acted unreasonably in making a determination that White did not fall “outside the spirit” of the Three Strikes sentencing law.

III. The Trial Court Properly Denied White’s Second Request for a Continuance of his Sentencing Hearing

White contends his sentence must be vacated because the trial court denied his second request for a continuance of his sentencing hearing. We disagree.

A. The Factual Context

On July 8, 2008, the prosecutor and White’s public defender, accompanied by White, appeared in Department 121 (Hon. Charlene Olmedo) and announced ready for trial, immediately following which White requested a *Marsden* hearing to replace his public defender. (*People v. Marsden* (1970) 2 Cal.3d 118.) The court heard White’s claims and denied his motion. On July 10, 2008, day “eight of ten,” all parties appeared in Department 123 (Hon. Peter Espinoza). At that time, White made a motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. The trial court referred the matter back to Department 121. The next day, the trial court (Judge Olmedo) granted White’s motion, with a warning that his trial would take place within 10 days. One week later, on the day set for trial (July 18, 2008), White asked the trial court (Hon. Patricia Titus) for a continuance because, in his words, he “just turned pro per four days ago.” When the court denied a continuance, White relinquished his self-represented status. The jury returned its verdict on July 24, 2008, and on the same date, the trial court set a sentencing hearing for August 7, 2008.

On August 7, at the initially scheduled sentencing hearing, White’s defense counsel advised the court that White had made some “some requests” which counsel had not had an opportunity to evaluate. Defense counsel requested a continuance and then spoke to the prosecutor regarding the grounds for the continuance. After listening to the explanations, the prosecutor opposed the motion based on what he believed were two inappropriate grounds: (1) a discovery request that the prosecutor already fulfilled and (2) a request to have a transcript of the entire trial before sentencing. The trial court ruled

it would give defense counsel additional time to prepare a *Romero* motion. Sentencing was continued to September 18, 2008.

On September 18, 2008, defense counsel once again informed the court that White wanted to represent himself and, therefore, desired a second continuance of the sentencing hearing to study “some outstanding discovery issues.” White then addressed the court, stating that he had evidence that would exonerate him. The court informed White that he had already been convicted and that, if there was any exonerating evidence, then it would have to be presented in an appeal or some other format after sentencing. The court further informed White that, if he wanted to represent himself at sentencing, then he would have to fill out a form and have a conversation afterwards with the court. At that point, White told the court he would go ahead with sentencing. Defense counsel continued to represent him.

B. The Governing Law

A continuance in a criminal trial may only be granted for good cause, and a trial court’s denial of a motion for continuance is reviewed for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) In reviewing a trial court’s decision to deny a request for a continuance, we are guided by the overriding principle that a trial court may not exercise its discretion over continuances in such a way to deprive a defendant of his right to prepare a defense, or his right to counsel, or his right to effective assistance of counsel. (*People v. Snow* (2003) 30 Cal.4th 43, 70.)

We see no abuse of discretion in White’s current case because we see nothing in the record tending to suggest that the denial of the second continuance of the sentencing hearing interfered with White’s right to present a defense, vis-à-vis sentencing, or with his right to counsel. On the contrary, the record suggests that White’s request for an additional continuance was just another attempt to manipulate and delay his case. It is also worthy of note that in the end, White actually abandoned his request for a second continuance after he decided against representing himself.

Finally, we see nothing in White's arguments to support a showing of prejudice. At best, White has made vague references to evidence which may "exonerate" him. Assuming he has such evidence, we agree with the trial court that the context of a sentencing hearing was not the proper time or place to make such evidence-based arguments.

IV. The Trial Court Properly Accepted White's Admissions to the Prior Convictions

White contends the trial court's finding that he had been convicted of two prior strikes must be reversed because the trial court failed to advise him properly of his constitutional trial rights before it accepted his admission to the truthfulness of the prior strike conviction allegations in the information. Although we find some omissions in the trial court's admonishments at the time White waived his constitutional rights, we find the error harmless.

A. The Factual Context

Immediately after the jury returned its verdict, the following exchange took place:

"THE COURT: All right. The jury has left the courtroom. [¶] So it's my understanding your client wants a jury trial on the priors?

"[DEFENSE COUNSEL]: Your Honor, my client is more interested in the *Romero* motion being heard with respect to his strike in that it's ten years old. He's willing to admit the priors, the other priors. However, he does want the court to consider striking his strike since it is ten years old. [¶] Would the court entertain the *Romero* motion regarding his strike, prior strike conviction?

"THE COURT: I'll entertain it, but we still have to do the trial on the prior. And I have ordered the jury back, and I don't have time to do it at this moment."

After the lunch recess, defense counsel told the court a jury trial on the priors would not be necessary, and the following exchange occurred:

"THE COURT: . . . So you are waiving the jury, and then you want a court trial, or are you waiving a jury and you are going to admit?

“[DEFENSE COUNSEL]: We are waiving the jury. We are going to admit the priors.”

After the court read the details of the prior conviction allegations, including the charges, dates, and case numbers, the court took White’s waiver and admission as follows:

“THE COURT: [¶] . . . [¶] Do you waive your right to have a jury trial on the truth of the priors at this time?

“[DEFENSE COUNSEL]: Yes, Your Honor.

“[WHITE]: Yes.

“THE COURT: I need to hear from Mr. White.

“[WHITE]: Yes.

“THE COURT: And do you admit that you have suffered those prior convictions as alleged in the information?

“[WHITE]: Yes.

“THE COURT: [Does defense] counsel join?

“[DEFENSE COUNSEL]: Join.”

B. The Record Supports the Conclusion that White’s Admission to the Truth of the Prior Convictions Allegations Was Voluntary and Intelligent

Before accepting a criminal defendant’s admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. Proper advisement and waivers of these rights in the record establish a defendant’s voluntary and intelligent admission of the prior conviction. (See *People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) A failure to expressly give any one of the three required admonitions, however, is harmless error when the record affirmatively shows, under the totality of the circumstances, that the defendant’s admission was, in fact, voluntary and intelligent. (*Id.* at pp. 360-361.)

In *Mosby*, as in White’s current case, the defendant was advised only of his right to trial on a prior conviction allegation before he admitted the truth of the allegation.

The Supreme Court nevertheless found the admission was voluntary and intelligent for the following reasons: “[D]efendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation. [¶] A review of the entire record also sheds light on defendant’s understanding. For instance, ‘a defendant’s prior experience with the criminal justice system’ is . . . ‘relevant to the question [of] whether he knowingly waived constitutional rights.’ [Citation.] That is so because previous experience in the criminal justice system is relevant to a recidivist’s “‘knowledge and sophistication regarding his [legal] rights.’” [Citations.] [D]efendant’s prior conviction was based on a plea of guilty, at which he would have received [the required] advisements.” (*Mosby, supra*, 33 Cal.4th at pp. 364-365, fn. omitted.)

We see no meaningful difference in the factual circumstances discussed in *Mosby* and the factual circumstances shown in the record in White’s current case. The record establishes that White understood he did not have to admit his prior strike and/or prior prison term convictions, and that he could have put the prosecution to the task of a trial. Under the totality of the circumstances, we conclude that White freely and intelligently admitted his prior convictions despite being advised of and having waived only his right to jury trial.

V. The Trial Court Properly Ruled on the In Camera Inspection of the Police Officers’ Records

In accord with *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232, White has requested this court to review independently the sealed reporter’s transcript of the in camera hearing at which the trial court examined the investigating and arresting officers’ personnel records in response to his *Pitchess* motion. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) On September 3, 2009, we directed the trial court to augment the record to include copies of the peace officers’ records actually reviewed by the trial court.

On October 1, 2009, we received and reviewed those records. We find no relevant materials to be disclosed beyond those which were ordered disclosed by the trial court.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.